

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-222241.2 **DATE:** June 20, 1986
MATTER OF: Economy Security Systems--Reconsideration

DIGEST:

Protest of agency's withdrawal of procurement from the 8(a) program is denied where protester does not present evidence of specific and malicious intent by government officials to injure the protester.

Economy Security Systems (ESS) requests reconsideration of our March 11, 1986 dismissal of its protest challenging the General Services Administration's (GSA) decision to award a dry cell battery supply contract to Burgess, Inc. instead of awarding the contract to ESS under the Small Business Administration's (SBA) section 8(a) program. We dismissed that protest pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1985), which provide that section 8(a) procurements are not subject to our review absent a showing of possible fraud or bad faith on the part of government officials; ESS's initial protest did not allege fraud or bad faith per se. We have reexamined ESS's protest in light of its request for reconsideration, and have concluded that the protest does adequately set forth the assertion that GSA officials acted in bad faith by continuing to negotiate with ESS after they should have known the contract would be awarded to another firm. For the reasons stated below, however, we deny the protest.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), authorizes the SBA to enter into contracts with government agencies for the purpose of arranging for performance of the contracts by socially and economically disadvantaged small business concerns. In August 1985, GSA issued request for proposals (RFP) No. AT/TC 19793 to SBA as a vehicle for a section 8(a) award to ESS. At the same time, GSA initiated a competitive procurement for the items.

On September 23, 1985, ESS submitted its first proposal, through SBA, offering to supply two of four items for \$12.26 (item 1307) and \$1.76 (1310). GSA responded to this proposal by letter of October 31, 1985 to SBA, stating

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that under the competitive solicitation for the same items the low bids for these items were \$7.42 and \$1.17, respectively. These bids were submitted by Burgess, ESS's supplier. Noting that the "ceiling prices" for the items were \$9.76 and \$1.32, the letter concluded that ESS's prices were "a long way" from being fair and reasonable.

By letter to SBA dated November 29, ESS submitted revised prices of \$10.21 and \$1.46 for the two items. GSA informed SBA in a January 8 letter that it still considered these prices unreasonably high. During a January 17 conference call from SBA's offices to GSA, ESS again reduced its prices, this time to \$9.74 and \$1.16, below the ceiling prices referred to in GSA's October 31 letter rejecting ESS's initial proposal. After being advised that GSA still viewed the \$9.74 price as excessive in light of the \$7.72 competitive bid price, ESS reduced this price to \$8.86 in a February 3 letter to GSA.

Despite these reductions, GSA informed SBA in a February 6 letter that the section 8(a) procurement was being withdrawn because: the prices were not considered to be fair and reasonable; it would not be in the best interest of the government to encourage competition in this area by ESS since, in the long run, the firm would not be able to compete with Burgess, its supplier; and SBA would not provide business development expenses (BDE) that would reimburse GSA the difference between Burgess' and ESS's prices. GSA awarded a contract to Burgess on February 5.

ESS complains that since Burgess, the low competitive bidder, was its supplier, ESS unknowingly was in the impossible situation of having to match the prices of its own manufacturer in order to qualify for the award. ESS charges that although GSA knew of this situation as early as October 31, GSA continued to negotiate to have ESS reduce its prices, only to make award to Burgess after ESS actually had reduced its prices below the ceilings referenced in GSA's October 31 letter. ESS argues that this constituted bad faith negotiating and asks that it now receive the 8(a) award.

GSA initially argues that ESS is not an interested party eligible to bring this protest (see 4 C.F.R. § 21.0(a)) because SBA in effect revoked its offer to contract with GSA on behalf of ESS by failing to appeal GSA's decision not to make an 8(a) award. We reject this argument. Were we ultimately to agree with ESS that GSA improperly denied ESS an 8(a) award, we could recommend that GSA now enter into an 8(a) contract arrangement with ESS

through SBA, the technicality of the lapse of SBA's contracting offer notwithstanding. This direct economic interest in the award qualifies ESS as an interested party.

As for the merits, GSA responds that it calculated the fair market prices for the two items based on previous award prices and the current bid prices, in accordance with the applicable regulations. Although these other prices were available to GSA at an early stage in the 8(a) negotiations, GSA states it continued negotiating because it believed SBA would pay the RDE, a prerequisite under applicable regulations to GSA's making an 8(a) award at more than the fair market price. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.806 (1984). When SBA advised GSA in January that it would not provide RDE, GSA determined it could contract with ESS only if ESS could meet the fair market price. It was ESS's failure to do so, not bad faith, according to GSA, which led GSA to make the award to Burgess.

By the terms of the Small Business Act, a contracting officer is authorized, in his discretion, to let an 8(a) contract to SBA upon terms and conditions to which the agency and SBA agree. It is because of this considerable discretion that a protester alleging bad faith must present virtually irrefutable proof that SBA or contracting agency officials had a specific and malicious intent to injure the protester. Prospect Associates, Ltd., B-218602, June 17, 1985, 85-1 C.P.D. ¶ 693. ESS has not met this standard.

ESS has presented no evidence that GSA proceeded with 8(a) negotiations with the specific intent of causing injury to ESS. Rather, ESS essentially asks us to infer bad faith on GSA's part based on its view that GSA should have known to discontinue 8(a) negotiations at an early stage, and the fact that GSA led ESS to expend time and money by continuing the negotiations. Inference and supposition do not constitute irrefutable proof, however, and thus will not support a finding of agency bad faith. Prospect Associates, Ltd., B-218602, supra. As stated above, the contracting officer has broad discretion in deciding whether to issue a section 8(a) contract to the SBA, and this discretion extends to situations, such as this, where the contracting agency initially engaged in efforts to award a contract under the section 8(a) program but ultimately determined not to do so. See, e.g., Manassa Systems, B-214249, Mar. 28, 1984, 84-1 C.P.D. ¶ 365.

We thus find no evidence of bad faith on GSA's part. Nevertheless, it is our understanding, based on information

from SBA, that, currently, BDE funds seldom are made available to reimburse agencies for price differentials above the fair market price, so that we question the reasonableness of GSA's belief that they would be available in this case. Moreover, we believe the problem here may not have arisen at all if GSA had clearly indicated to SBA or ESS that it considered Burgess' prices to represent the fair market prices for the items, and that an 8(a) contract would be awarded only if ESS met those prices or SBA funded the difference between Burgess' low bid and ESS's prices in the form of BDE. Had GSA made its position clear, ESS could have decided during the early stages of procurement, rather than afterward, whether it would be feasible or practical to continue with negotiations. Since we cannot conclude that GSA was acting with the specific intent to injure ESS, however, these considerations simply do not provide a basis on which to sustain the protest.

ESS also argues that GSA violated FAR, 48 C.F.R. § 19.708, by not including in the competitive solicitation, which resulted in award to Burgess, three small business and small minority business concern subcontracting plan provisions. As GSA points out, two of the provisions--found at 48 C.F.R. §§ 52.219-8 and 52.219-9--were incorporated in the solicitation here by reference. Inclusion of the third provision, found at 48 C.F.R. § 52.219-10 (dealing with an incentive subcontracting program), is discretionary, and the contracting officer here determined subcontracting incentives were unnecessary. In any case, this aspect of the protest is untimely since it was not raised before the bid opening. See 4 C.F.R. § 21.2(a)(1).

The protest is denied.

for Raymond Efron
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General Counsel